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OWINGS v. NORWOOD'S LESSEE.

In an action of ejection between two citizens of Maryland, for a tract of land in Maryland, if the defendant set up an outstanding title in a British subject which he contends is protected by the treaty, and therefore the title is of the plaintiff; and the highest state court in Maryland decides against the title thus set up; it is not a case in which a writ of error can lie to the supreme court of the United States.


It is not "a case arising under a treaty." The judiciary act must be restrained by the constitution of the United States.

ERROR to the court of appeals of Maryland, being the highest court of law and equity in that state, in an action of ejection brought by the defendant against the plaintiff in error, both parties being citizens of Maryland, for a tract of land in Baltimore county, called "*The Discovery*," being part of a tract of land called Brown's Adventure, originally patented for 1,000 acres to Thomas Brown, in the year 1695, who conveyed to John Gadsby, who conveyed to Aaron Rawlins in 1703, who mortgaged in fee to Jonathan Scarth, a London merchant, by deed of bargain and sale, in 1706, with a proviso to be void upon payment of 800*l.* sterling, with interest, on the 13th of May, 1709. Scarth and his heirs were always British subjects resident in England, and never were in Maryland; but Scarth was charged with the quit-rents, in the Lord Proprietor's debt-books, up to the time of the revolution. Rawlins, however, by his will, in 1741, devised the land specifically to some of his children, without taking any notice of the mortgage. In 1732, Littleton Waters attached, and obtained judgment of condemnation against the land, for a debt due to him from Scarth, but never took out any execution upon the judgment; and by deed of lease and release assigned all his right in the land to the Baltimore company, under whom the plaintiff in error claims.

In October, 1794, Norwood obtained an escheat warrant to affect the tract called Brown's Adventure, upon suggestion of a defect of heirs of Brown, the original patentee. In June, 1800, he obtained a patent from the state founded upon the proceedings under that warrant, for 520 1-2 acres, being part of Brown's Adventure, with an addition of 26 acres of vacant land, and thereupon brought his action of ejection against Owings. Upon the trial the original defend-

ant, in order to show an existing title out of the plaintiff, contended that the mortgage to Scarth was protected from confiscation by the British treaty of 1794, and was still a security for the money to the representatives of Scarth, who were proved to be still living in England. "But the court were of opinion that on the expiration of the time limited in the mortgage for the payment of the money, a complete legal estate of inheritance vested in the mortgagee liable to confiscation; and was vested in the state by virtue of the act of confiscation of *October session, 1780, c. 45.* and the act of the same session, (*c. 49.*) (*to appoint commissioners,*) subject to the right of redemption in the mortgagor and his heirs, and that the British treaty cannot operate to affect the plaintiff's right to recover in this ejectment."

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The verdict and judgment of the general court being affirmed in the court of appeals of Maryland, and being against the right claimed under the treaty, Owings sued out his writ of error under the provisions of the 25th section of the judiciary act, *vol. 1. p. 63.* which enacts, that a final judgment in the highest court of a state, in a suit "where is drawn in question the construction of any clause of a treaty, and the decision is against the right claimed under such clause of the treaty, may be re-examined and reversed or affirmed in the supreme court of the United States."

Harper, for the plaintiff in error.

The question in this case is, whether Scarth's interest in the land was protected by the treaty of peace with Great Britain. By the 5th article of the treaty "it is agreed that all persons who have any interest in confiscated lands, either by *debts*, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." The case of *Higginson and Mein*, decided by this court, (*ante, vol. 4. p. 415.*) was, in substance, the same as this. In both, the time of payment had passed before the confiscation; and the legal estate

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was in a British subject. The court in that case decided that the confiscation did not destroy the lien which the British creditor had in the land under the mortgage.

LIVINGSTON, J. Could the mortgagor, sixty or seventy years after the time of payment, maintain a bill to redeem?

Harper. The mortgagee never was in possession of the land; the lapse of time, therefore, would rather operate as a bar to foreclosure than redemption.

Ridgely, contra.

By the act of assembly of Maryland, passed at October session, 1780, c. 45 and c. 49, all the property in that state belonging to British subjects, *except debts*, was confiscated and *vested* in the state, without inquest of office, or entry, or any other act to be done. The statute operated a complete change of property and possession.

This was not at that time a debt due to Scarth. Nearly a century had elapsed since the mortgage was forfeited. There was no covenant in the mortgage for payment of the money; no bond taken, or other evidence of a debt. Rawlins never took any measures to redeem, but abandoned the pledge, as an absolute sale. It is a general principle in equity that the mortgagor shall not redeem if the mortgagee has been in possession twenty years after forfeiture of the mortgage. It was not necessary for Scarth to file a bill to *foreclose*; because the right to redeem was barred by his twenty years' possession. If Rawlins could not have redeemed in 1780, the estate was absolute in Scarth, and the confiscation was complete. There is no case in England, or Maryland, where the mortgagor has been permitted to redeem after twenty years, if no interest has been paid, or account kept between the parties. *Pow. on Mort.* 152. 3 *P. Wms.* 287. 2 *Atk.* 496. 2 *Vern.*

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But if Scarth's heirs might avail themselves of the treaty, it is not competent for a third person to set it up. Or if it is, it will not give this court jurisdiction.

Johnson, Attorney-General of Maryland, on the same side

If the judgment below be not against a right claimed under the treaty, if it be not a case arising under the treaty, this court has no jurisdiction.

In this case Owings claims no right under the treaty. Scarth's right, whatever it may be, is not affected by the decision of this case. It is he only who could claim the benefit of the treaty. But he is not a party in the suit. It is, therefore, not a case arising under the treaty.

MARSHALL, Ch. J. There are only two points in this case.

1. Whether Scarth had such an interest as was protected by the treaty; and,

2. Whether the present case be a case arising under a treaty, within the meaning of the constitution.

This court has no doubt upon either point.

The interest by debt intended to be protected by the treaty, must be an interest holden as a security for money at the time of the treaty; and the debt must still remain due.

The 25th section of the judiciary act must be restrained by the constitution, the words of which are, "all cases arising under *treaties*." The plaintiff in error does not contend that his right grows out of

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the treaty. Whether it is an obstacle to the plaintiff's recovery is a question exclusively for the decision of the courts of Maryland.

Harper, on the next day, having suggested to the court that he understood the opinion to be that this court had no jurisdiction to revise the decisions of the state courts, in cases where the construction of a treaty was drawn in question *incidentally*, and where the party himself did not claim title under a treaty, was about to make some further observations on those points, when


MARSHALL, Ch. J. observed, that Mr. Harper had misunderstood the opinion of the court, in that respect. It was not that this court had not jurisdiction if the treaty were drawn in question *incidentally*.

The reason for inserting that clause in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals. It was to avoid the apprehension as well as the danger of state prejudices. The words of the constitution are, "*cases arising under treaties.*" Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth, nor of any person claiming under him, can be affected by the decision of this cause.

Harper. The opinion is more limited than I apprehended. But in this case the land is claimed as confiscated, and the question is, whether the plain-

tiff's title, by confiscation, is good under the treaty. The defendant has a good title against every body who cannot show a better. He has a right to protect himself, by showing that the plaintiff has no title. In order to do this, he insists that the title of the plaintiff is inconsistent with the treaty. He has a right to set up the treaty in opposition to the confiscating act of Maryland.

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Martin, on the same side.

The reason of the clause in the constitution was, that there might be uniformity of decision upon all questions arising upon the construction of the constitution, and laws and treaties of the United States. In every case, the question concerning a treaty must come on incidentally. The intention was, that wherever a state court should decide against a claim, set up under the construction of a treaty, such decision should be examinable in this court.

This was the coterminous exposition given to the constitution by the first congress, convened under that constitution, and which was composed of a great number of the leading members of the convention by which the constitution was framed; and who must have well known what was the intention of that body in adopting that article.

The right of the plaintiff to recover in this suit, and the right of the defendant to retain the possession as against this plaintiff, depend upon the treaty.

The property having been once granted, the state could not again acquire the title but by escheat or confiscation. The court below decided, that it was not a case of escheat, because the heirs of Scarth were living. Whether the property was confiscated within the meaning of the treaty, is therefore the only remaining question upon the merits of the case. That question, however, is not before this court, until this court shall decide whether they are

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competent to consider it in this case. We consider the judiciary act as a correct exposition of the constitution in this respect, and that this is clearly a case within the provisions of the 25th section of that act.

This argument produced no alteration in the opinion of the court; and the

Writ of error was dismissed.*

° As this cause occupied a considerable portion of the time and talents of the courts and bar of Maryland, and as it decided several important points in that state, it seemed not improper to give a short abstract of the case as it appears in the bills of exception.

Upon the trial, the defendant Owings took 10 bills of exception.

The 1st bill of exceptions stated that the plaintiff offered in evidence a patent from the lord proprietor of Maryland to Thomas Brown, dated November 10, 1695, for a tract of land called Brown's Adventure, containing 1,000 acres. Also a patent from the state of Maryland to Edward Norwood, the original plaintiff in this action, dated 25th June, 1800, for a tract of land called "*The Discovery*," containing 530 1-2 acres, included within the lines of Brown's Adventure. The defendant offered evidence that the heirs of Brown, the original patentee, were still living in Maryland. The defendant offered in evidence a deed from Brown to Gadsby, dated May 2, 1700, on which was an endorsement dated May 4, 1699, purporting to be a receipt for the alienation fine due to the lord proprietor. And the following "Memorandum: That the date of this was originally according to the date of the above receipt, but aliened by consent of the provincial court and parties, to bring it within the act of assembly.

"W. TAYLARD."

Whereupon the defendant prayed the court to instruct the jury that if they were of opinion that the endorsements were made at the request of Gadsby the grantee, and with his privity and consent, and that the deed with the endorsements was recorded for his benefit, and with his assent, then the endorsements are competent to be read in evidence to support the facts therein contained against the title of Gadsby to the lands in the deed mentioned. But the court was of opinion that the memorandum of Taylard "was not evidence, being an act done by the said W. Taylard without authority, and that the said deed was valid and operative in law to transfer the said land to the said Gadsby."

The 2d bill of exceptions states that, in addition to the above evidence, the plaintiff offered in evidence a deed from Gadsby to Barker, for 130 acres, part of Brown's Adventure, dated 10th of July, 1701. Also a deed from Gadsby to Aaron Rawlins of the residue of Brown's Adventure, dated 2d of October 1703. Also a deed of mortgage in fee from Rawlins to Jonathan Scarth, dated the 13th of May, 1706. He also offered evidence that Barker and Scarth died before 1795, without heirs. Also an *escheat* warrant to the plaintiff, dated 28th of October, 1795, and a certificate of resurvey, and a patent thereupon to the plain-